ILE COPY

Office Supreme Court, U.S.
FILED
MAY 18 1959
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

No. 848

SIDNEY M. KELLER and WILLIAM S. KELLER,
Petitioners,

vs.

EDWIN L. SANGER,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

FREDERICK J. HERTZ
ROBERT B. COOK
A. LOUIS FLYNN
209 South La Salle Street
Chicago 4, Illinois
Counsel for Respondent

The Scheffer Press, Inc.—ANdover 3-6850

INDEX

	PAGE
Opinions below	1
Jurisdiction	1
Questions presented	1
Statute involved	3
Statement	3
Summary of argument	6
Reasons for denying the writ	8
Conclusion	17
Appendix	
Order entered by the District Court on January 8, 1959	1a

CITATIONS.

CASES.

Arrowsmith v. Gleason, 129 U.S. 86, 99 (1889)	8, 15
Booth v. Merchants National Bank of Brownsville, Texas, 100 F. 2d 478, (C.A. 5, 1938)	13
Chadwick v. Watkins, 258 S.W. 2d 194, 197 (Tex. Ct. Civ. App., 1953)	11
Cross v. Hancock's Estate, 176 S.W. 2d 586 (Tex. Ct. Civ. App., 1943)	11
Giddings v. Steele, 28 Tex. 732 (1866)	11
Green v. Green, 218 F. 2d 130 (C.A. 7, 1954), cert. den. 349 U.S. 917; 233 F. 2d 642, 644 (1956); 248 F. 2d 780 (1957)	16
Holt v. King, 250 F. 2d 671, 675 (C.A. 10, 1957)	14
Lee v. Minor, 256 F. 2d 507, 508 (C.A. 9, 1920)	14

PAGE

Lindley v. Lindley, 201 S.W. 2d 108, 113 (Tex. Ct. Civ. App., 1947) 11

Looney v. Capital National Bank of Austin, Texas, 235 F. 2d 436 (C.A. 5, 1956) 13

Markham v. Allen, 326 U.S. 490, 494 (1946) 13, 15

Meccano v. Wanamaker, 253 U.S. 136, 141 (1920) 9

Milbert v. Bison Laboratories, 260 F. 2d 431, 434 (C.A. 3, 1958) 9

Moore v. Lumbermen's Reciprocal Assn., 262 S.W. 472 (Tex. Comm. App., 1924) 11

Myers v. Canton National Bank of Canton, Illinois, 109 F. 2d 31, 32 (C.A. 7, 1940) 11

O'Connor v. Slaker, 22 F. 2d 147 (C.A. 8, 1927) 14

Patton v. Gregory, 21 Tex. 513 (1858) 11

Princess Lida v. Thompson, 305 U.S. 456, 466 (1939) ..8, 16

Rosenberg v. Baum, 153 F. 2d 10, 13 (C.A. 10, 1946) 12

Sanders v. Hart, 171 S.W. 2d 531 (Tex. Ct. Civ. App., 1943) 11

Sutton v. English, 246 U.S. 199, 205 (1918) 8, 12, 13, 15

Updike v. United States, 8 F. 2d 913, 916 (C.A. 8, 1925) 12

Wyman v. Newhouse, 93 F. 2d 313 (C.A. 2, 1937), cert. den. 303 U.S. 664 14

PAGE

STATUTES.

U.S.C., Title 28, Section 1292(b), added by Public Law 85-919, 85th Congress, 1st Session, approved September 2, 1958 ..... 2, 3, 6, 9

RULES.

Rule 17(b), Federal Rules of Civil Procedure 10

CONGRESSIONAL COMMITTEE REPORTS

Committee On the Judiciary of the Senate (Senate Report No. 2434, 85 Cong., 2d Sess., pp. 3, 4—1958) 9

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958.

No. 848

SIDNEY M. KELLER and WILLIAM S. KELLER,
Petitioners,

vs.

EDWIN L. SANGER,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

OPINIONS BELOW.

No opinion was rendered by the Court of Appeals or the District Court. A copy of the order entered by the District Court on January 8, 1959, is printed at page 1a of the Appendix hereto.

JURISDICTION.

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED.

The immediate question is set forth in Paragraph 1 below. The other questions are restatements of that presented as No. 1 in the Petition.

1. In denying leave to appeal from the interlocutory order of the District Court (Appendix 1a hereto) approving the Special Master's report and granting the Respondent's motion for discovery, did the Court of Appeals abuse, or exercise improperly, the discretion expressly vested in it by the Interlocutory Appeals Act (Section 1292(b), Title 28, U.S.C., added by Public Law 85-919, 85th Congress, 1st Session, approved September 2, 1958—Appendix 1a to Petition)?

2. Did the District Court have jurisdiction over an action by a citizen of Texas, as an heir of his deceased wife who was also domiciled there, against her only other heirs, two brothers of the decedent who were citizens of Illinois, for an accounting and recovery of his share of property owned by her at the time of her death, alleged to be in their control; the requisite statutory amount being involved, her intestacy being alleged, there being no creditors or other parties in interest, no probate proceedings being pending when the action was instituted, and an alleged will then being unlawfully and fraudulently concealed by the Illinois heirs?

3. If the District Court acquired jurisdiction, was it divested thereof by the subsequent entry by the Probate Court of Dallas County, Texas, of an order admitting the alleged will to probate as a muniment of title only, without administration; the order having been obtained by the Illinois heirs (Petitioners here) after issues were joined in the District Court, while hearings were in progress before a Master and without notice to the plaintiff (Respondent here), who thereupon brought proceedings in Texas to vacate the order?

STATUTE INVOLVED.

The pertinent provisions of the Interlocutory Appeals Act (Section 1292(b), Title 28, U.S.C., added by Public Law 85-919, 85th Congress, 1st Session, approved September 2, 1958) are set forth at Appendix 1a to the Petition.

STATEMENT.

The "Statement" in the Petition does not disclose all facts material to the consideration of the questions presented. Therefore, additional facts are set forth herein.

The statements in the Petition as to the contents of the complaint, which was filed on May 2, 1956, are substantially correct. Additional allegations were that the Respondent (plaintiff below)[1] is a citizen of Texas, that under the laws of that State he inherited all of the personal property of his deceased intestate wife, and that the corporate defendants issued stock or held title to property in which the decedent was alleged to have had an interest which passed to the Respondent. (Ans., P. 2, Par. 4)

As alleged in the counter-affidavit of the Respondent filed in opposition to the Petitioners' motion for summary judgment, when Respondent's wife died on July 30, 1954, he did not know whether or not she had left a will; he made numerous inquiries of the Petitioners as to whether she had executed a will; if any such instrument existed, they refused to permit him to read it and refused to deliver it to him; on or about July 20, 1955, he mailed

[1] The Statement in the Petition contains no references to any record. References herein are to pages and paragraph of the answer ("Ans.") of Respondent filed in the Court of Appeals, constituting, with the petition there, the only record in that court.

to the Petitioners a letter requesting that the original of any such will be mailed to him or to the Clerk of the County Court, Probate Division, Dallas, Texas; the Petitioners failed and refused to grant this request; and, therefore, the Respondent was obliged to abandon probate proceedings which he had begun in Texas. (Ans. P. 2, Par. 6)

The joint answer of the Petitioners was filed on May 24, 1956. Although it denied her intestacy and alleged the existence of a will of the decedent, no copy thereof was annexed to the answer or tendered to the Respondent and no statement as to its terms appeared. Petitioners admitted the custody by Petitioner Sidney M. Keller of minor assets of the decedent. A counterclaim alleging, and a reply denying, that the decedent was indebted to the Petitioners, were also filed. (Ans., P. 3, Par. 9)

A motion by Respondent for discovery was opposed by Petitioners in the District Court. It was superseded by Respondent's later motion for discovery hereinafter mentioned. (Ans., P. 4, Par. 10)

The Respondent is an heir at law of the decedent, and is also a legatee, devisee and co-executor under her alleged will. Nevertheless, and in violation of the statutes of Illinois, the Petitioners suppressed and withheld the alleged will from the Respondent and from filing in any court from the time of decedent's death on July 30, 1954, to March 25, 1957. On the latter date a purported will was filed, but not offered for probate, in the office of the Clerk of the Probate Court of Cook County, Illinois. The filing occurred after the third hearing before the Master. The Respondent did not learn of such filing until June 3 or 4, 1957. (Ans., P. 3, Par. 7)

On July 16, 1957, a motion by the Petitioners for summary judgment was denied by the District Court.

On December 12, 1957, Petitioner William S. Keller filed with the Probate Court of Dallas County, Texas, an application for the probating of the alleged will. No notice of the application or hearing thereon was given to the Respondent in person or by mail or publication, although he has for many years resided in Dallas, Texas, where the Probate Court of Dallas County, Texas, sits. Notice of the hearing was posted on or near the courthouse door. (Ans., P. 7, Par. 17)

The Probate Court in Texas was not apprised as to all pertinent facts, and was permitted, without objection by Petitioners' counsel there, to enter an order probating the will as a muniment of title, with a recital that there was no necessity for administration and with a further recital that the Petitioner William S. Keller had been named in the alleged will as executor and, in the event of his death or inability to act, the Petitioner Sidney M. Keller was to be his successor. No mention was made of the designation of the Respondent under the will as co-executor with respect to property in Texas. (Ans., P. 7, 8, Par. 17, 18)

No notice of the filing of the application for probate on December 12, 1957, was given to the District Court or the Master until the Petitioners requested leave on or about February 25, 1958, to file a supplemental answer informing the Court as to the entry of the order of probate on January 20, 1958. On January 15, 1958, a hearing was held before the Master, but Petitioners' counsel remained silent as to the filing of the application. Within the time permitted by law, the Respondent instituted a proceeding in the Texas court to vacate the order of probate. (Ans., P. 9, Par. 19)

By the terms of the alleged will, all residuary property was left, in three equal parts, to the two Petitioners and the Respondent. (Ans., P. 9, Par. 20)

On January 8, 1959, an order (Appendix 1a hereto) was entered by the District Court overruling objections of the Petitioners to the Master's report (which found jurisdiction and recommended the granting of Respondent's motion for discovery), approving the report and granting the motion.

On January 16, 1959, a petition for leave to appeal from that order, pursuant to the Interlocutory Appeals Act (Section 1292(b), Title 28, U.S.C., added by Public Law 85-919, 85th Cong., 1st Sess., approved September 2, 1958) was filed by the Petitioners. Answer thereto was filed by the Respondent on January 21, 1959. On January 27, 1959, the Court of Appeals entered an order (Appendix 2a to the Petition to this Court) denying such leave.

SUMMARY OF ARGUMENT.

1. No substantial question of federal law not determined by this Court, no conflict with applicable statutes or decisions of this Court or any Court of Appeals, and no departure from accepted judicial procedure, is involved. The right of a person to seek relief in the federal courts in a matter pertaining to an estate, where no administration or interference with the general probate jurisdiction of any state is presented, and where the requisite diversity of citizenship and amount in controversy exist, was affirmed long ago by this Court. The relevant phases of law and authorities are discussed in some detail hereinafter in the argument pursuant to Point 3 of this summary.

2. The Interlocutory Appeals Act (by the above amendment of September 2, 1958) specifically provides that leave

to appeal shall be granted or denied "in the discretion" of the Court of Appeals. Great weight is accorded to a ruling by such a Court on an interlocutory appeal and, unless clearly erroneous, its decision will not be disturbed. No abuse, or improper exercise, of discretion is shown by the record here.

3. At no time has the Respondent requested the District Court to determine the validity of any alleged will of the decedent or to administer her estate. The complaint sought to obtain discovery of, and an accounting for, any property of the decedent held or controlled by the Petitioners here and the delivery to the Respondent of any part thereof to which he was entitled. When the complaint was filed, no will of the decedent had been offered for probate, and no administration of her estate had been had in Texas, the state of decedent's domicile. Furthermore, all persons interested as heirs, legatees or creditors were parties to the action. Therefore, the Respondent, here had a right to institute the action and the District Court had jurisdiction thereof.

4. The jurisdiction which the District Court obtained upon the filing of the complaint could not thereafter be divested by a state court, for any one or more of the following reasons: (a) the method by which the Petitioners procured, without notice to the Respondent, the District Court or the Master, the entry of the order of probate issued by the Probate Court of Dallas County, Texas, on January 20, 1958, was fraudulent; (b) even assuming, for argument, the validity of that order, since it did not provide for administration but recited that there was no necessity thereof, it plainly continued the application of the rule of law under which the Respondent was entitled to bring the action; and (c) the proceeding before the District Court was an action *in rem* in which it exercised no probate jurisdiction and in which no state court

could thereafter supersede, or interfere with, its prior jurisdiction.

REASONS FOR DENYING THE WRIT.

I.

No substantial and unsettled question of federal law, conflict of decisions, or necessity of supervision of procedure, is involved. The principles applicable here were determined long ago by this Court.

In the light of the past decisions of this Court, the case does not raise "an important, novel and difficult issue involving the jurisdiction of the federal district courts", as asserted in the Petition. Long ago this Court emphasized the lack of power in federal courts to probate a will or administer an estate. Such action has at no time been sought here. On the other hand, this Court has consistently held that federal courts will not hesitate to assume and retain jurisdiction of proceedings by an heir of the nature presented here, particularly those which are marked by the absence of probate proceedings when the action was begun, the suppression by the Petitioners at that time of a will alleged by them to be in existence and the fraudulent method employed by them in later obtaining its admission to probate. (*e.g., Sutton* v. *English*, 246 U.S. 199, 205 (1918); *Princess Lida* v. *Thompson*, 305 U.S. 456, 466 (1939); *Arrowsmith* v. *Gleason*, 129 U.S. 86, 99 (1889)). The principles established, the cases just cited and other applicable authorities are treated hereinafter under Subdivisions III and IV hereof.

II.

No abuse, or improper exercise, of discretion by the Court of Appeals is shown. Therefore its decision should not be disturbed.

The Interlocutory Appeals Act, by the addition of Subsection (b) on September 2, 1958, specifically provides that leave to appeal from interlocutory orders as therein specified is to be granted or denied "in the discretion" of the Court of Appeals. Here the Petitioners asked such leave for various reasons. Apparently their principal ground was alleged lack of jurisdiction of the District Court.

The decision of a Court of Appeals upon an appeal from an interlocutory order is to be given great weight and will not be reversed unless clearly erroneous (*Meccano* v. *Wanamaker*, 253 U.S. 136, 141 (1920)).

The intent of Congress that Subsection (b) of the Interlocutory Appeals Act be sparingly applied and be used only in exceptional cases was pointed out at length in *Milbert* v. *Bison Laboratories*, 260 F.2d 431, 434 (C.A. 3, 1958). The weight to be placed upon the discretion exercised by the Court of Appeals, and the manner in which its discretion might be employed and evidenced were also indicated. The Court stressed the legislative intent by quoting, among other things, from the report on the bill embodying the Interlocutory Appeals Act which was made by the Committee on the Judiciary of the Senate (Senate Report No. 2434, 85 Cong. 2d Sess., pp. 3, 4, 1958). The report was, in part, as follows:

> "The granting of the appeal is also discretionary with the court of appeals which may refuse to entertain such an appeal in much the same manner that the Supreme Court today refuses to entertain applications for writs of certiorari.
>
> "It should be made clear that if an application for an appeal from an interlocutory order is filed with

the court of appeals, the court of appeals may deny such an application without specifying the grounds upon which such a denial is based. It could be based upon a view that the question involved was not a controlling issue. It could be denied on the basis that the docket of the circuit court of appeals was such that the appeal could not be entertained for too long a period of time. But whatever the reason, the ultimate determination concerning the right of appeal is within the discretion of the judges of the appropriate circuit court of appeals."

No evidence of abuse, or improper exercise, of discretion by the Court of Appeals is manifested by the record here. The only question of any apparent substance submitted to it was that of jurisdiction. As explained hereinafter in Subdivision III, that question had been settled definitely and in a manner adverse to the contentions of the Petitioners.

III.

The District Court acquired jurisdiction in the action upon the institution thereof by the Respondent.

Under Rule 17(b) of the Federal Rules of Civil Procedure,[2] the Respondent's capacity to sue is governed by the laws of his domicile. That domicile was in Texas. So far as has been disclosed, the decedent's estate consisted entirely of personalty.

The general rule of Texas law is that actions to recover property belonging to an estate can be brought only by administrators or executors. However, in a chain of decisions extending over a period of one hundred years, the Texas courts have held that an exception to the general

[2] Rule 17(b) is, in part, as follows: "The capacity of an individual, other than one acting in a representative capacity, to sue or be sued shall be determined by the law of his domicile."

rule exists when there are no debts of the estate or when there is but one creditor, and particularly where the creditor himself is a party to the litigation. (*Patton* v. *Gregory*, 21 Tex. 513 (1858); *Giddings* v. *Steele*, 28 Tex. 732 (1866); *Moore et al.* v. *Lumbermen's Reciprocal Assn.*, 262 S.W. 472 (Tex. Comm. App., 1924); *Cross* v. *Hancock's Estate*, 176 S.W. 2d 586 (Tex. Ct. Civ. App., 1943); *Sanders* v. *Hart*, 171 S.W. 2d 531 (Tex. Ct. Civ. App., 1943); *Lindley* v. *Lindley*, 201 S.W. 2d 108, 113 (Tex. Ct. Civ. App., 1947); and *Chadwick et al.* v. *Watkins*, 258 S.W. 2d 194, 197 (Tex. Ct. Civ. App. 1953)).[3]

In *Moore et al.* v. *Lumbermen's Reciprocal Assn.*, the court pointed out the general rule in the following words:

> "It is undoubtedly true that it is the general rule that heirs cannot sue without alleging and proving that there is no administration upon the estate, and that there is no necessity for one. (Citing nine Texas cases). • • • There are various exceptions to this rule noted in some of the cases just cited. • • • The general rule is grounded primarily on the necessity for the protection of creditors of the deceased. The heirs of one dying intestate are at once entitled to the possession and enjoyment of his estate incumbered by the debts of the deceased. The administration is allowed to protect the rights and interest of creditors. If no debts exist against the estate, there is no necessity for administration, and the probate court has no jurisdiction to open one." (P. 473).

The answer did not allege the existence of other creditors. In the absence of affirmative proof or identification of debts, it will not be presumed that they exist (*Cross* v.

---

[3] An example of the recognition of this exception in the federal courts, as applied to Illinois law, is **Myers et al. v. Canton National Bank of Canton, Illinois, et al.**, 109 F.2d 31, 32 (C.A. 7, 1940).

Hancock's Estate; 176 S.W. 2d 586 (Tex. Ct. Civ. App. 1943)). Under Petitioners' theory of the case, no federal inheritance taxes would be payable. Even if they were, they are not to be considered as debts, for "a tax is not a debt in a strict sense" (*Updike et al.* v. *United States*, 8 F. 2d 913, 916 (C.A. 8, 1925)).

The Petition relies strongly upon the case of *Sutton* v. *English*, 246 U.S. 199 (1918), and quotes language therefrom as authority for the proposition that a federal court cannot exercise probate jurisdiction. The opinion denominated the proceeding as being, in an essential feature, a suit to annul a will. That power was denied. Here it is not sought.

Sutton v. *English* has been cited and followed in scores of reported opinions of the lower courts. It is a landmark, however, for another proposition in which it has been regarded as a directive in a large part of the cases mentioned. That proposition was set forth at 246 U.S. 205:

> "By a series of decisions in this court it has been established that * * * questions relating to the interests of heirs, devisees or legatees, or trusts affecting such interests, which may be determined without interfering with probate or assuming general administration, are within the jurisdiction of the federal courts, where diversity of citizenship exists and the requisite amount is in controversy. *Broderick's Will*, 21 Wall. 503, 509, 512; *Ellis* v. *Davis*, 109 U.S. 485, 494 *et seq.*; *Farrell* v. *O'Brien*, 199 U.S. 89, 110; *Waterman* v. *Canal-Louisiana Bank Co.*, 215 U.S. 33, 43."

The doctrine was expressed in almost identical words in *Rosenberg* v. *Baum*, 153 F. 2d 10, 13 (C.A. 10, 1946), with the addition of the following:

"And that jurisdiction cannot be limited or curtailed by state legislation creating probate courts and vesting in them exclusive jurisdiction over the settlement of estates of decedents. *Payne* v. *Hook*, 7 Wall. 425, 19 L. Ed. 260; *Miami County National Bank* v. *Bancroft*, *supra*."

After citing the case of *Sutton* v. *English*, 246 U.S. 199, 205 (1918), as demonstrating lack of jurisdiction in the District Court, the Petition cites the later case of *Markham* v. *Allen*, 326 U.S. 490, 494 (1946), as an illustration of "confusion and uncertainty" in such matters. On the contrary, that case, as does *Sutton* v. *English*, supports the doctrine urged here. The opinion contained the following language:

"It is true that a federal court has no jurisdiction to probate a will or administer an estate . . . But it has been established by a long series of decisions of this Court that federal courts of equity have jurisdiction to entertain suits 'in favor of creditors, legatees and heirs' and other claimants against a decedent's estate 'to establish their claims' so long as the federal court does not interfere with the probate proceedings or assume general jurisdiction of the probate or control of the property in the custody of the state court. *Waterman* v. *Canal-Louisiana Bank Co.*, 215 U.S. 33, 43, and cases cited. See *Sutton* v. *English*, *supra*, 205; *United States* v. *Bank of New York Co.*, 296 U.S. 463, 477; *Commonwealth Trust Co.* v. *Bradford*, 297 U.S. 613, 619; *United States* v. *Klein*, 303 U.S. 276; *Princess Lida* v. *Thompson*, 305 U.S. 456, 466."

Similar conclusions were reached in *Booth* v. *Merchants National Bank of Brownsville, Texas*, 100 F. 2d 478 (C.A. 5, 1938), involving an action against an executor for allegedly converting and withholding stock belonging to the plaintiff as a devisee under a will; *Looney* v. *Capital National Bank of Austin, Texas*, 235 F. 2d 436

(C.A. 5, 1956); *Holt* v. *King*, 250 F. 2d 671, 675 (C.A. 10, 1957); and *O'Connor* v. *Slaker*, 22 F. 2d 147 (C.A. 8, 1927).

The Respondent has at no time requested the District Court to probate, annul or construe any alleged will of the decedent or to administer her estate. The province of probate jurisdiction is not invaded or hindered by the Respondent's prayer to the District Court for an accounting from the Petitioners as to property of the decedent which is in their control or custody and the delivery to the Respondent of any interest to which he may be entitled.

IV.

The jurisdiction of the District Court was not divested by the subsequent entry of the disputed order of the Probate Court of Dallas County, Texas, admitting the alleged will of Respondent's wife to probate as a muniment of title and without administration.

A.

The actions of the Petitioners in obtaining the order of probate in Texas and permitting the misapprehension of the Court there in entering the order were designed to keep the Respondent, the Master and the District Court in ignorance of the filing or pendency of the application for probate until the order had been entered, and thus to deprive the Respondent of his right to appear and assert his rights in the probate proceeding.

The federal courts will not sanction fraud in a state court proceeding (*Wyman* v. *Newhouse*, 93 F. 2d 313 (C.A. 2, 1937), cert. den. 303 U.S. 664). In *Lee* v. *Minor*, 256 F. 2d 507, 508 (C.A. 9, 1920), the Court said:

"Extrinsic fraud or mistake may consist, among other things, of keeping the unsuccessful party away from court * * * by purposely keeping him in ignorance of the suit."

A federal court may relieve a litigant from the visitation of fraud (*Arrowsmith* v. *Gleason*, 129 U.S. 86, 99 (1889)).

B.

As already shown, lack of administration constitutes one of the exceptions to the general rule that an heir cannot sue another heir to recover his interest in property comprised in an estate. The order of probate contains no appointment of an executor or administrator and specifically decrees that no administration is necessary. Thus there is no personal representative or process of administration with which the District Court could interfere. The incongruous action of the Petitioners continued, through the probate order which they fraudulently obtained, the absence of any administration of the estate and of any person who might, with judicial authority, assert rights on its behalf. The order served merely to keep in effect, and, if valid, possibly to perpetuate, the situation which permitted the Respondent to bring the suit in the District Court in his personal capacity.

C.

The applicability of the principles enunciated in *Sutton* v. *English*, 246 U.S. 199, 205 (1918) and *Markham* v. *Allen*, 326 U.S. 490, 494 (1946), remained unaffected by the entry of the order of the Probate Court of Dallas County, Texas. In each of those cases an order of probate had been entered before the action was begun.

Another relevant principle was enunciated in *Princess Lida* v. *Thompson*, 305 U.S. 456, 466 (1939). This Court said:

> "* * * If the two suits (federal and state) are *in rem*, or *quasi in rem*, so that the court, or its officer, has possession or must have control of the property which is the subject of the litigation in order to proceed with the cause and grant the relief sought, the jurisdiction of the one court must yield to that of the other. We have said that the principle applicable to both federal and state courts that the court first assuming jurisdiction over property may maintain and exercise that jurisdiction to the exclusion of the other, is not restricted to cases where property has been actually seized under judicial process before a second suit is instituted, but applies as well where suits are brought to marshal assets, administer trusts, or liquidate estates, and in suits of a similar nature where, to give effect to its jurisdiction, the court must control the property."

The Court of Appeals for the Seventh Circuit has had occasion to apply that principle, at comparatively recent dates, in the much-litigated case of *Green* v. *Green*, 218 F. 2d 130 (C.A. 7, 1954), cert. den. 349 U.S. 917; 233 F. 2d 642, 644 (1956); and 248 F. 2d 780 (1957). In overruling a contention that the District Court had no jurisdiction in a suit for accounting and other relief with respect to assets under a testamentary trust, because of the pendency of a probate proceeding in an Illinois state court, the Court of Appeals said at 233 F. 2d 644:

> "The rule is well established that a Federal District Court with prior jurisdiction of a suit *in rem* may at its discretion issue an injunction to prevent any interference with its possession of the *res*, or its effectual determination of the issues, rights and remedies involved in the litigation. *Kline* v. *Burke*

Construction Co., 260 U.S. 226, 235, 43 S. Ct. 79, 67 L. Ed. 226; *Looney* v. *Eastern Texas R. Co.*, 247 U.S. 214, 221, 38 S. Ct. 460, 62 L. Ed. 1084."

The action herein the District Court would in no way interfere with any probating, accounting or settlement in the Probate Court in Texas. Actually there is no such matter to be interfered with, for the Probate Court, if its order be valid, has decreed that no administration is necessary. The proceeding in the District Court is essentially an action *in rem*, and, under the prevailing law, its prior jurisdiction cannot be wrested from it by a state court.

CONCLUSION.

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

FREDERICK J. HERTZ
ROBERT B. COOK
A. LOUIS FLYNN
209 South La Salle Street
Chicago 4, Illinois
Counsel for the Respondent

May 14, 1959

CERTIFICATE OF SERVICE.

I hereby certify that on May 15, 1959, I served copies of the foregoing brief personally upon counsel of record for the Petitioners by delivering said copies at their office, to a clerk therein; the names and post-office addresses of said counsel being as follows:

SOL A. HOFFMAN
MAURICE L. DAVIS
33 South Clark Street
Chicago, Illinois

Dated May 15, 1959.

.....

A. LOUIS FLYNN
Counsel of Record
For the Respondent

Appendix—Order Entered by District Court on January 8, 1959.

UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

EDWIN L. SANGER, Plaintiff
v.
SIDNEY M. KELLER, et al., Defendants.
No. 56 C 817

ORDER

This matter came on to be heard on (1) objections of defendants to the Report, filed herein on August 18, 1958, of Michael L. Igoe, Jr., Special Master in Chancery appointed by this court, and to the findings, conclusions and recommendations therein; and (2) motion of defendants to vacate the order of reference to said Special Master.

The court has examined and considered the said Report, the said objections thereto and the said motion to vacate the reference herein and, further, has considered the briefs submitted by counsel.

The court is of the opinion that the Report of the Special Master herein should be confirmed and approved and his findings of fact and conclusions of law adopted as the findings and conclusions of this court; that the objections of the defendants should be overruled and that the motion of defendants to vacate the order of reference should be denied.

Reviewing the Master's said Report, as well as the transcripts of proceedings had before him pursuant to the order of reference herein, this court is further of the

view that the purposes, for which such reference was made, have been accomplished to the court's satisfaction; that when defendants, as directed by this order, shall have produced the documents set forth and requested in plaintiff's motion, this cause, being then ready to proceed to an early trial before this court on the issues, should be set down for a pre-trial hearing.

The court finds that the Special Master herein is entitled to compensation for his services and expenditures incurred as such Special Master in this matter, and further finds that such compensation should be taxed as costs herein. The court, however, reserves the matter of fixing such compensation until it shall be brought up on motion by the Master at a later date, and a hearing shall be had thereon.

Appendix—Order Entered by District Court on January 8, 1959.

It is, therefore, Ordered

(1) That the motion of defendants to vacate the order of reference to Michael L. Igoe, Jr., Special Master in Chancery be and it hereby is denied.

(2) That objections of the defendants to the Report filed herein by Michael L. Igoe, Jr., Special Master in Chancery on August 18, 1958, and to the findings, conclusions and recommendations therein, be and they are hereby overruled.

(3) That the Master's Report be confirmed and approved and his findings of fact and conclusions of law be and they are hereby adopted as the findings and conclusions of this court.

(4) That on or before January 20, 1959, defendants produce, at the office of defendants' attorneys, and permit plaintiff to inspect and copy or photograph each of the documents enumerated in plaintiff's motion for production of documents filed with the Master on September 30, 1957, as amended under date of February 5, 1958, but with the following exception: Defendants shall not be required to produce those documents which, in hearings before the Master, they denied exist and which both defendants and plaintiff during such hearings agreed shall not be required to be produced.

(5) That this cause be set down for a pre-trial hearing on January 21, 1959, at 4:00 o'clock P.M.

The court is of the opinion that this order involves a controlling question of law as to which there is substantial ground for difference of opinion, and that an immediate appeal from this order may materially advance the ultimate termination of this litigation.

Enter:

(Signed) J. S. Perry
Judge

Dated: January 8, 1959
Chicago, Illinois